Filed 8/23/13 In re T.V. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re T.V. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. ANGEL V., Defendant and Appellant.	F066305 (Super. Ct. Nos. 12CEJ300140-1 & 12CEJ300140-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Brian M. Arax, Judge.

Gino de Solenni, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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Angel V. (father) is the noncustodial father of two minors, T.V. and A.V. Father contends that there is insufficient evidence to support the juvenile court's findings that the children were described under Welfare and Institutions Code section 300, subdivision (d)[1]. He also contends that the juvenile court failed to ask him whether he had any Indian heritage, as required for purposes of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). While we find there is sufficient evidence to sustain the juvenile court's jurisdictional finding, we agree that the juvenile court erred in failing to ask father about his Indian heritage. Accordingly, we will remand the matter with directions.

PROCEDURAL AND FACTUAL HISTORY

On May 29, 2012, the Fresno County Department of Social Services (Department) filed a petition pursuant to section 300, subdivision (d), alleging that T.V., age 16, had been sexually abused by J.H., her mother Christine S.'s[2] live-in boyfriend (allegation d-1).; that T.V.'s brother A.V., age 12, was at a substantial risk of similar abuse (d-2); and that mother had failed to protect both minors from sexual abuse by failing to adequately protect T.V. from sexual abuse (d-3). J.H. admitted to law enforcement that he had fallen "in love" with T.V. when she was 10 years old and that he started to molest her when she turned 13. He admitted ongoing sexual abuse that included sexual intercourse. When informed that J.H. had been sexually abusing T.V., mother's initial reaction was denial and she thought J.H. had been coerced into confessing. Mother said that she and T.V. had been "having issues," and that when she had earlier tried to discipline T.V., T.V. beat mother and she filed assault charges against

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] Mother is not a party to this appeal.

her. There is no mention in the detention report that indicated A.V. had been the object of J.H.'s molestation.

The whereabouts of father were unknown at the time, but according to mother, his name is on the children's birth certificates and she is still legally married to him. The Department "considers [father] to be the presumed father." Both T.V. and A.V. were placed in protective custody.

The detention report repeated the above allegations and the additional claim, made by mother, that when T.V. was nine, she told mother that father had touched her inappropriately. Mother stated that, at the time, she was in an abusive relationship with father and "could not get away from it." Mother stated that father was physically abusive towards her and A.V. Mother then sent T.V. to live with mother's father, but she kept A.V. with her because "he was just an[] infant." The record indicates that both mother and father signed over custody of T.V. to mother's parents in November 2000, when T.V. would have been four years old. In the original police report, dated May 24, 2012, T.V. told officers not only of the abuse by J.H., but also that, when she was "about three or five years old," her father attempted to rape her and that her grandfather cared for her after that.

At the May 30, 2012, detention hearing, the juvenile court found that the Department had established a prima facie case that the minors came within the meaning of section 300, subdivision (d), and that there was no reasonable means to protect the minors' safety other than their continued removal from mother's custody.

The report prepared in anticipation of a settlement hearing stated that the minors were placed together in foster care. By this time, mother acknowledged that T.V. had been sexually abused by J.H. and stated that she would keep the minors away from J.H., who was incarcerated on criminal charges related to the sexual abuse. T.V. did not want to return to mother's custody. Prior to the jurisdiction hearing, mother's visitation with

T.V. was suspended for talking with the minors about returning to her custody and blaming T.V. for the minors' removal.

An amended petition filed July 18, 2012, alleged the same allegations as the original petition (d-1, d-2, d-3) and included the allegations T.V. had been sexually abused by father (d-4) and that mother failed to protect T.V. from father when she failed to report the abuse (d-5).

Father was located in Spokane, Washington. He was indigent and lacked funds to travel to court proceedings. He denied that he had ever attempted to sexually molest T.V.

A report prepared in anticipation of the jurisdiction hearing indicated that the minors did not want physical contact with father, but were willing to Skype or have telephone contact with him. T.V. said that father had been out of her life since she was either five or seven and that he had been physically abusive toward mother. T.V. stated that father had sexually abused her and that the abuse had occurred in front of A.V., when he was about two years old standing up in his crib and watching. Mother again said that the abuse occurred when T.V. was three years old and that she had not reported it to law enforcement because T.V. had not wanted her to do so. When asked why she let a three-year-old make a "big decision to determine if law enforcement should be contacted," mother said, "I know there is no statute of limitation on sexual abuse therefore she could deal with it later when [T.V.] was older." Mother said that her own father filed a report with law enforcement "to what happened to [T.V.] by her dad …."

The report indicated that mother had said she did not have any Indian ancestry. But the report made no mention of whether any inquiry had been made regarding any Indian ancestry on father's side.

At the contested jurisdiction hearing held September 27, 2012, the Department withdrew the allegation that A.V. was at a substantial risk of sexual abuse (d-2) and recommended that he be returned to mother's custody under a family maintenance plan. Mother submitted on the issue of jurisdiction with respect to the allegations that T.V. had

been sexually abused by J.H. (d-1), that her failure to protect T.V. from sexual abuse was a failure to protect both minors from sexual abuse (d-3), and that her failure to report the allegations about father had been a failure to protect T.V. from sexual abuse (d-5).

Father was not present at the jurisdiction hearing, but his trial counsel alleged there was insufficient evidence to support the allegations that father had sexually abused T.V. (d-4 and d-5). Counsel for the Department questioned whether father had any standing to contest allegation d-5, as the allegation was specifically pled as to mother. After discussion with the juvenile court, counsel for father agreed that if allegation d-4 was found not true, allegation d-5 "by default would be gone." Counsel then argued a lack of any corroborating evidence coupled with the lack of any investigation into allegation d-4. The Department argued that T.V.'s statement was sufficient to sustain the allegation. The juvenile court, while noting the strength of father's trial counsel's argument, nonetheless found true the allegations that father had sexually abused T.V. Mother's visitation with T.V. was suspended until disposition; visitation with father remained in the form of Skype, letters or electronic contact with the minors.

The report prepared in anticipation of disposition stated that T.V. was placed in a foster home while A.V. had been returned to his mother's custody under a family maintenance plan. T.V. did not wish to be returned to mother's custody. Mother was participating in services. Father, who had no known criminal history, did not request placement. Both minors indicated they would write to father, but had not done so yet.

At the October 31, 2012, disposition hearing, the matter was submitted on the reports. The juvenile court found T.V. and A.V. to be dependents of the court pursuant to section 300, subdivision (d), that there was clear and convincing evidence that. T.V. would be at a substantial risk of danger if she was returned to mother's custody, and she was ordered continued in foster care. Mother was given reunification services as to T.V. and visitation if certain conditions were met on the part of T.V. and her therapist. A.V. was continued in mother's custody under family maintenance services.

Father did not seek and was not provided reunification services pursuant to section 361.2. Father was allowed electronic, written and supervised visits.

DISCUSSION

1. Sufficiency of the Evidence as to T.V.

Father contends there was insufficient evidence to support the juvenile court's finding that he had sexually abused T.V. within the provisions of section 300, subdivision (d), as alleged in allegation d-4 of the amended petition. Bearing in mind that father does not have and did not wish custody of either T.V. or A.V., he raises this issue "because it is prejudicial to him and could impact these or future dependency proceedings." (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) We agree that the ruling, if erroneous, has the potential father cites and, therefore, shall consider the merits of his appeal.

Father's challenge to the sufficiency of the evidence in support of the juvenile court's jurisdictional findings is governed by a substantial evidence standard of review. "'When the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence … to support the conclusion of the trier of fact. [Citation.] In making this determination, all conflicts are to be resolved in favor of the prevailing party …. [Citation.] In dependency proceedings, a trial court's determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]' [Citations.]" (*In re P.A.* (2006) 144 Cal.App.4th 1339, 1344.)

> "'Substantial evidence is evidence that is "reasonable, credible, and of solid value"; such that a reasonable trier of fact could make such findings. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924.) [¶] It is axiomatic that an appellate court defers to the trier of fact on such determinations, and has no power to judge the effect or value of, or to weigh the evidence; to consider the credibility of witnesses; or to resolve conflicts in, or make inferences or deductions from the evidence. We review a cold record and, unlike a trial court, have no opportunity to observe the appearance and demeanor of the

> witnesses. [Citation.] "Issues of fact and credibility are questions for the trial court." [Citations.] It is not an appellate court's function, in short, to redetermine the facts. [Citation.]' (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 199-200; accord, *Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.)" (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 194-195, disapproved on other grounds in *In re I.J.* (2013) 56 Cal.4th 766.)

Under section 300, subdivision (d), a child is within the jurisdiction of the juvenile court if he/she:

> " … has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse."

Penal Code section 11165.1, defines a litany of acts comprising sexual abuse, sexual assault and sexual exploitation. The proscribed acts also include child molestation under Penal Code section 647.6, which makes it a crime to annoy or molest any child under the age of 18. (See, e.g., *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749 ["'Annoy and molest' are synonymous and mean to disturb or irritate, especially by continued or repeated acts; to vex, to trouble; to irk; or to offend."].)

The evidence supporting the d-4 allegation is found in the Department's addendum jurisdiction report prepared for a July 18, 2012, hearing date, as well as the police report prepared on May 24, 2012, which is attached to the original jurisdiction report. In the police report, T.V. described the sexual abuse she suffered at the hands of J.H. and also told the officers that her biological father had attempted to rape her when she was three to five years old. In the addendum jurisdiction report, when told by the social worker that father was requesting visitation, T.V. stated she did not want physical contact with father and that she was afraid he might try to do something against her again. T.V. then said that father had been physically abusive against mother and had sexually abused her. When asked if T.V. was comfortable discussing the abuse in front of her brother, A.V., T.V. stated that she had told A.V. what father had done to her.

According to T.V., A.V. was approximately two years old standing in his crib and watching when father sexually abused T.V.

Mother confirmed that when T.V. was approximately three years old, T.V. told her that father had abused her. According to mother, she did not report the abuse because T.V. did not want her to do so and, because there is no statute of limitations on sexual abuse, T.V. could deal with it when she was older. Mother did say that her own father had filed a police report on the abuse, and the record shows that mother and father both gave custody to mother's father when T.V. was four years old.

Father makes much of the fact that, at one point, mother had said the abuse occurred when T.V. was nine years old, which is inconsistent with her statement that it occurred when T.V. was three. While the original detention report stated that mother had said that, when T.V. was nine, she told mother that father had touched her inappropriately, the remainder of her statement appears to indicate that mother misspoke. Mother also said that, at the time T.V. told her of the abuse, she was in an abusive relationship with father and "could not get away from it." Instead, mother sent T.V., at age four, to live with mother's father, as borne out by the record , but that she kept A.V. with her because "he was just an[] infant." T.V. and A.V. are a little more than three and one-half years apart, which would make T.V. much less than nine at the time of the abuse.

The evidence against father, while not overwhelming, established that sexual abuse of T.V. by him occurred when she was "about 3 years old." Issues of fact and credibility of witnesses are for the trial court alone. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.) "Under the substantial evidence rule, [the appellate court has] no power to pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) Since substantial evidence supports the juvenile

court's jurisdictional finding that T.V. is described by section 300, subdivision (d) as the result of father's conduct, that finding is affirmed.

2. Sufficiency of the Evidence as to A.V.

Father makes the additional argument that there is insufficient evidence to support the finding that A.V. came within the provisions of section 300, subdivision (d), because the evidence did not establish that mother had failed to protect A.V. adequately from sexual abuse. We do not see how this issue impacts father.

First, the allegation that A.V. was at substantial risk of sexual abuse by J.H., as alleged in allegation d-2, was withdrawn by the Department at the contested jurisdiction hearing September 27, 2012.

Second, the other allegation concerning risk of harm to A.V., allegation d-3, alleged that mother had failed to protect both children from sexual abuse due to the sexual abuse T.V. suffered by J.H. Mother submitted on this issue. Father is not mentioned in this allegation. We question whether he has any standing to contest the issue and we do not see how it in any way could or would prejudice him.

And third, allegation d-5, which alleged that mother failed to protect T.V. from father, did not include the allegation that it applied to A.V. as well. For these reasons, we need not address father's claim further.

3. ICWA Compliance

Father's final argument is that the juvenile court erred in failing to carry out its duties of inquiry into whether the minors had any Indian ancestry, as required by ICWA. Father contends that the failure to do so requires this court to reverse the disposition order.

In general, ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1918, 1920, 1921.) Under the notice provisions of ICWA, if "the court knows or has reason to know that an Indian child is involved," the

social services agency must "notify … the Indian child's tribe … of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).)

ICWA itself does not expressly impose any duty to inquire as to Indian ancestry. Neither do the controlling federal regulations. (See 25 C.F.R. § 23.11(a) (1994).) But, ICWA also provides that states may provide "a higher standard of protection to the rights of the parent … of an Indian child than the rights provided under [ICWA]." (25 U.S.C. § 1921.)

California Rules of Court, rule 5.481(a),[3] which implements the ICWA's inquiry provisions in California, provides that both the juvenile court and the Department have "an affirmative and continuing duty to inquire whether a [dependent] child is or may be an Indian child." Rule 5.481(a)(1) requires the social worker to ask the child's "parents … or legal guardians whether the child is or may be an Indian child …."

In addition, "[a]t the first appearance by a parent … in any dependency case … the court must order the parent … to complete *Parental Notification of Indian Status* (form ICWA-020.)" (Rule 5.481(a)(2).) Father argues there are no ICWA forms from him in the record, nor is there any evidence that the Department fulfilled its duty of inquiry. We thus review the record for other indications that the social worker asked father about any possible Indian heritage. While there are several places in the record which note that mother was asked and denied having any Indian ancestry before father's whereabouts were discovered, none suggest that father was ever asked once he became a party to the proceedings. For this reason, we conclude that the Department did not fulfill its duty to inquire of father as to the children's Indian heritage.

We refuse to speculate about what father's response to any inquiry might have been, and instead remand the matter to the trial court with directions, as set forth below. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461.)

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3 All further references to rules are to the California Rules of Court.

DISPOSITION

The matter is remanded to the juvenile court with directions to inquire of father whether T.V. or A.V. may be Indian children. If the inquiry produces evidence that they are or may be Indian children, then the juvenile court must direct the Department to give notice of the underlying proceedings on any upcoming hearing(s) in compliance with ICWA to the Bureau of Indian Affairs (BIA) and any identified tribes. (25 U.S.C. § 1912.) If the inquiry of father produces no evidence that T.V. and A.V. are Indian children, or there is no confirmation that they are or may be eligible for Indian tribal membership, the court may proceed accordingly.

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Kane, J.

WE CONCUR:

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Gomes, Acting P.J.

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Detjen, J.